IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 836/2022**

In the matter between:

KWIKFORM FORMWORK & SCAFFOLDING

(PTY) LTD t/a FORM SCAFF **APPLICANT**

IN RE;

KWIKFORM FORMWORK SCAFFOLDING

(PTY) LTD t/a FORM SCAFF **APPLICANT**

And

MOTSA INVESTMENTS (PTY) LTD **FIRST RESPONDENT**

THE NATIONAL COMMISSIONER OF

POLICE **SECOND RESPONDENT**

THE ATTORNEY GENERAL **THIRD RESPONDENT**

Neutral citation: *Kwikform Formwork & Scaffolding (Pty) Ltd v Motsa Investments (Pty) Ltd & Others (836/2022) SZHC* 252 *[2022]* (09/11/2022)

CORAM: **B.S DLAMINI J**

DATE HEARD: 27 October 2022

DATE DELIVERED: 10 November 2022

Summary: *Motion proceedings brought under a certificate of urgency- Applicant seeking order for cancellation of written lease agreement and for the return of leased equipment-Respondent alleging that equipment was sold to it and that the purchase price was paid in full to Applicant's bank account. Determination of proper cause of action and whether Applicant's reliance on a specific clause of the written contract entitles it to relief claimed.*

Held; *The Applicant relied on a wrong clause in the alleged lease agreement in seeking to enforce its*

rights in terms of the contract. Applicant further did not disclose the exact amount of arrears entitling it to cancel the agreement.

Held further; *Having communicated its position regarding the equipment, Applicant was required to amongst other relief, seek declaratory order that lease agreement is still in force and that the purported sale alleged by Respondent did not take place .*

JUDGMENT

INTRODUCTION

[1] The Applicant approached the Court under certificate of urgency and in the main, seeks the following orders;

"*1. Dispensing with the normal time limits, forms and manner of service and enrolling this matter to be heard as one of urgency and ex parte;*

2. *Condoning the Applicant's non-compliance with the rules of the above Honourable Court in relation to non-service and time limits;*

3. *That a rule nisi returnable on a date to be determined by the above Honourable Court do issue calling upon the First and Second Respondents to show cause why an order in the following terms should not be made final;*

4. *The Deputy Sheriff is hereby directed and required:*

   4.1 *Forthwith to serve the order, the notice of motion and the founding affidavit upon the Respondents and to explain the nature and exigency thereof.*

   4.2 *Locate, attach and secure all the equipment on the various premises of the First Respondent or wherever and from whomever the equipment's may be found, the equipment being those listed at annexure "D1" of the Founding Affidavit.*

   4.3 *Make an inventory thereof.*

   4.4 *Remove the equipment from the premises of the Respondent and place it under his custody or under safe custody until the finalization of this matter.*

4.5 That the above Honourable court confirm cancellation of the credit agreement by the Applicant... "

[2] On the 12th May 2022, an interim order was granted by the Court and, since the *rule nisi* was being sought on an *ex parte* basis, it was emphasized by the Court that the interim order was only for judicial attachment of the assets and was not authorizing the Deputy Sheriff to attach and remove the assets from the possession of the Respondents.

[3] On being served with the interim order and notice of motion, the Respondents duly filed their opposing papers and the Applicant filed its Replying Affidavit accordingly.

APPLICANT'S CASE

[4] As already captured herein, the Applicant is seeking an order for the cancelation of the credit agreement and for the attachment and return to it of the equipment currently in the possession of the Respondents. The basis for such is that the Applicant alleges to be the true owner of the assets in question.

[5] In its Founding Affidavit, the Applicant has alleged that;

"8. During the completion and signature of the agreement the Applicant was duly represented by myself as director of the Applicant and the First Respondent was by Mr. Moses Motsa, the Second Respondent herein, in his capacity as director of the First Respondent. A copy of the credit agreement is annexed hereto and marked "A"...

10. Pursuant to the above agreement the Applicant proceeded to lease scaffolding, formwork and construction equipment to the First Respondent on a credit basis. A copy of all delivery notes for equipment leased and delivered to the First Respondent is annexed hereto and marked "B". It is important to note that quotes are a precursor to delivery notes and invoices, and a copy of all quotes are annexed hereto and marked "C"...

19. Around the end of February/beginning March 2022, I visited the First Respondent's premises in Siteki to make a follow up on payment of the leased equipment hired from us and he advised me that he had bought the leased equipment from the Applicant on the 15 October 2021, he also handed a copy of a letter to me that he claimed to have emailed to our office. It was the first that I had sight of this letter, and I verily state that the

letter is a forgery and was never received by the Applicant or any of its employees."

RESPONDENT'S CASE

[6] The Respondent's Answering Affidavit raises several points *in limine* and also addresses the matter on the merits. The points *in limine* raised on behalf of the Respondents are that;

6.1 The matter contains material disputes of fact which cannot be resolved on the papers.

6.2 The Applicant has failed to disclose material facts which are relevant to the determination of the matter.

6.3 The Applicant is approaching the Court with dirty hands.

6.4 The matter is lacking in urgency.

[7] On the merits of the matter, it is alleged by the Respondents that;

"9.2 It is further stated that applicant's representative Mr. Maake only made cordial visits to the construction site of the 1st respondent;

9.2.1 The one I remember was sometime in August 2021 when I met Mr. Maake in the company of Ms. Dlamini in a site meeting

resulting in the applicant recommending additional equipment for lease to the 1st respondent.

9.1.2 Another occasion where in the beginning of March 2022 Mr. Maake came to pay a courtesy visit and also ask for copies of the proof of payment for the purchase price of the sum of E 409,000.00 (Four Hundred and Nine Thousand Emalangeni).

10.1 I would like to clarify that in the meeting aforesaid I explained to Mr. Maake my urgent desire to purchase some of the leased goods as it was being rather expensive to continue leasing same than purchasing them. He agreed to the arrangement which is why I eventually paid the amount of E 409,000.00 (Four Hundred and Nine Thousand Emalangeni) to applicant's account and this agreement was purely oral.

10.4 At all material times Mr. Maake presented himself to me as director of the applicant and that he possessed the necessary authority to bind the applicant."

[8] The Respondents have denied that there were outstanding arrears in October 2021 when they allegedly purchased the equipment from Mr Maake. It is also alleged by the Respondents that initially there was a

lease agreement for the equipment entered into between the parties but that such agreement was cancelled when the parties entered into the sale agreement in October 2021.

ANALYSIS AND CONCLUSION

TRUE NATURE OF AGREEMENT NOT ESTABLISHED

[9] There are a number of issues arising in the dispute between the parties in this matter. What the Court is required to determine is the legal nature of the agreement entered into between the parties. In its heads of argument and, during the hearing of the matter, the Applicant insisted that the agreement entered into between the parties is either a lease agreement or a credit agreement.

[10] In prayer 4.5 of the Notice of Motion, the Applicant has sought an order "***that the above Honourable Court confirm cancellation of the credit agreement by the Applicant***." First and foremost, the agreement is not '*by the Applicant*' but is professed to be between two parties, namely the Applicant and the Respondent. This is the main relief sought by Applicant and must be crafted with precision and accuracy. If the Court is to cancel an agreement by the Applicant, the

question arising is; why should that order bother or involve the Respondents?

[11] The other problematic feature with the relief sought is that Applicant has sought an order cancelling a 'credit agreement' entered into by the 'Applicant'. Counsel for Applicant insisted during argument in Court that a credit agreement is the same as a lease agreement or that the parties intended their agreement to be in the form of a credit agreement, lease agreement or sale agreement, all in one.

[12] In cementing her argument in Court, Applicant's legal representative submitted that the agreement qualifies to be classified as a 'credit agreement' because Applicant 'loaned' the equipment to the Respondents who were in turn required to pay a fee or price in consideration for the 'loaned' equipment.

[13] In paragraph [9] of the Founding Affidavit, it is stated by the Applicant that;

"The explicit terms of the Credit Agreement are as follows as stated hereunder..."

[14] Paragraph [10] of the Applicant's Founding Affidavit states that;

"Pursuant to the above agreement the Applicant proceeded to lease scaffolding, formwork and construction equipment to the First Respondent on a credit basis."

[15] It is clear from the above that the Applicant uses the phrases 'credit agreement' and 'lease agreement' interchangeably in reference to one agreement. The Respondents referred the Court to the Supreme Court judgment in the matter of **Swaziland Development Finance Corporation v Long Run Investments (Pty) Ltd In re; Swaziland Development Finance Corporation v Long Run Investments & Others Civil Cases No's 2 & 3/2008 (hereinafter referred to as "Fincorp matter")** in which it was held by the Court that;

"4. **Immediately we pointed out to Mr. Jele, who appeared for the Appellant, that the Appellant had not been entitled to any relief in the light of the confusion as to the nature of its agreements with the respondent, he submitted that this court could and should make an order rectifying the agreements in order to eliminate the confusion. Even though the Respondent admitted the allegations in paragraph 5 of the founding affidavit and thereby must be**

taken to have admitted annexures VM1, VM2 and VM3, were in fact lease agreements notwithstanding the references therein to sale, that admission would not solve all the Appellant's problems. Moreover, there was no room for us to make an order for rectification simply in response to an informal request from the Bar. In any event, it is not possible to amend a statement in an affidavit."

[16] A credit agreement is defined as follows;

"A credit agreement is a legally-binding contract documenting the terms of a loan agreement; it is made between a person or party borrowing money and a lender. The credit agreement outlines all of the terms associated with the loan."

See: http//www.investopedia.com

[17] A lease agreement on the other hand is described as follows;

"A lease is a legal, binding contract outlining the terms under which one party agrees to rent property owned by another party. It guarantees the tenant or lessee use of the property and

guarantees the property owner or landlord regular payments for a specified period in exchange."

See: http//www.investopedia.com

[18] A lease agreement cannot therefore be equated or treated the same as a credit agreement. If the two are used interchangeably as though meaning one and the same thing, it simply means the cause of action is not established. The Supreme Court judgment relied upon by the Respondents is therefore relevant and is applicable to the facts of this matter.

[19 Another difficulty which the Applicant faces relates to the duty of the Applicant to make out a *prima facie* in its Founding Affidavit. It is stated by **Herbstein & Van Winsen, <u>The Civil Practice of the High Court of South Africa</u> (5th Ed) Vol 1, at page 439** that;

"The supporting affidavits must set out a cause of action. If they do not, the respondent is entitled to ask the court to dismiss the application on the ground that it discloses no basis on which the relief can be granted.

In application proceedings the affidavits constitute not only the evidence but also the pleadings and, therefore, while it is not necessary that the affidavits 'should set out a formal declaration or [an answering] affidavit set out a formal plea, these documents contain, in the evidence they set out, all that would have been necessary in a trial.

As was pointed out by Miller J in *Hart v Pinetwon Drive-in Cinema (Pty) Ltd,*

"Where proceedings are brought by way of application, the petition is not equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

[20] In the Founding Affidavit, the Applicant starts off its claim by alleging that;

"During the completion and signature of the agreement the Applicant was duly represented by myself as director of the Applicant and the First Respondent was represented by Mr. Moses Motsa, the Second Respondent herein, in his capacity as director of the First Respondent. A copy of the credit agreement is annexed hereto and marked "A".

[21] There is no allegation in the Founding Affidavit to the effect that the parties entered into an agreement and, whether such agreement was oral or in written form in order to found a proper cause of action. There is also no allegation as to *where and when* the agreement was concluded. Accordingly, the alleged agreement which forms the basis of the Applicant's cause of action, does not contain averments which would properly establish a right to the relief claimed. This, in the Court's view, is a serious hurdle to Applicant's success in obtaining the relief sought.

[22] There is an even more serious impediment to Applicant's claim as supported by the Founding Affidavit. It is alleged by the Applicant in paragraph 28 of the Founding Affidavit that;

"28. The First Respondent has been in default of punctual payment of the rental amounts for the equipment hired to him by the Applicant. As per the terms of the agreement, specifically clause 4.7, the Applicant is entitled to cancel the agreement and claim for damages and the return of the goods. For this reason, too, the Applicant hereby terminates the agreement."

[23] Clause 4.7 relied upon by Applicant provides as follows;

"Should the Customer default in the punctual payment on due date of the purchase price payable in respect of any goods or default in the punctual observance or performance of any of its other obligations or undertakings then Form-Scaff shall have the right to immediately institute action for payment of the amount due or for specific performance alternatively to cancel the contract in respect of the sale of any such goods and to demand that the customer forthwith return, at its own expense, any goods already delivered to the Customer and not paid for or not fully paid for to Form-Scaff and should the Customer fail to do so then Form-Scaff will have the right to apply to any competent court for

an *ex parte* order for repossession of such goods. Any such action taken by Form-Scaff shall be without prejudice to Form-Scaff's rights to recover all loses or damages sustained by Form-Scaff in respect of damage and/or depreciation and/or repairs required to be made to the goods so recovered or otherwise."

[24] The clause relied upon by Applicant for the relief claimed is in respect of a sale of goods and not a lease or credit agreement. The Supreme Court judgment in the *Fincorp matter* (referred to above) finds equal application on this point. The Applicant cannot rely on a 'sale of goods' clause wherein its case is founded on a lease or credit agreement. This fact alone is bound to bring forth misery to the Applicant and collapse its case.

WAS THERE A LEASE OR CREDIT AGREEMENT BETWEEN THE PARTIES?

[25] Attached to the application and marked as annexure "A" is a document which the Applicant refers to as the 'credit agreement'. The document itself is titled "*Application Form-Trade Account*". The document has several sections requiring information from the person presumably applying to do business with the Applicant. Section 11 of

the Application Form is headed '*terms of trade (incorporating a Deed of Suretyship)*'. The 'terms of trade' are what the Applicant refers to as the 'terms of the credit agreement' or 'lease agreement'.

[26] In clause 1 of the *terms of trade*, it is provided that;

> "**1. The terms hereof shall form part of and apply to all contracts entered into unless specifically excluded or amended by the parties, such exclusion or amendment to be in writing and signed on behalf of the parties.**"

[27] Clause 1 of the '*terms of trade*' therefore anticipates that upon an application to do business with the Applicant being approved, the parties shall enter into a written contract and incorporate all the terms of trade specifically mentioned in Section 11 of the form in that contract. The application form designed by the Applicant was therefore never intended to constitute a contract in itself. Any doubt to this conclusion is removed by a reference to clause 3 of the terms of trade which provides;

"3. **The following specific provisions shall apply in the event that the transaction entered into between Form-Scaff and the customer is the hire of goods, namely;**

3.1 Each hire shall be a separate contract governed by these terms.

3.2 Unless otherwise stated, in writing..."

[28] There being no separate written contract as envisaged in clause 3 of the terms of trade in the application form, one can only surmise that the agreement to lease the equipment to the Respondents was based on an oral agreement. The terms of the oral agreement are however not known to the Court and have not been pleaded by the Applicant. There is certainly no written credit or lease agreement existing between the parties, unless of course the terms of trade contained in section 11 (clauses 1-3) of the application form have no force of law. The Court is of the firm view that this perhaps explains the reason why the Applicant avoided to state whether the contract was written or oral. This also explains why prayer 4.5 of the notice of motion

speaks of cancelling a credit agreement by the Applicant. The application form is in-house and belongs to the Applicant. The expectation was that upon Respondents' application for the hire of goods being approved, there would then be a separate written hire of goods agreement being concluded between the parties.

[28] If there is no written 'hire of goods agreement' as envisaged in section 11 of the application form, then Applicant's case once again falls flat. The Applicant pleaded and based its case on a credit agreement which does not exist. Had the Applicant relied on an oral lease agreement pursuant to the application to do business with it being approved, then its case would be different. In terms of section 11 of the application form, the parties had to waive the right to enter into a written contract in writing. There being no such waiver, the anticipated agreement had to be in writing.

WHETHER OR NOT THERE WAS AN ORAL SALE AGREEMENT

[29] In their defence to the Applicant's application, the Respondents have alleged that the initial lease agreement existing between the parties in

respect of the equipment was superseded by a sale agreement in terms of which Mr. Maake agreed to sell the leased equipment to them for a price of E 409,000.00.

[30] At the time of launching the urgent application, the Applicant knew of the Respondent's position regarding the alleged sale of the equipment. This is confirmed in paragraph 19 of the Founding Affidavit wherein Mr Maake deposes as follows;

"Around the end of February/ beginning March 2022, I visited the First Respondent's premises in Siteki to make a follow up on payment for the leased equipment hired from us and he advised me that he had bought the leased equipment from the Applicant on the 15 October 2021, he also handed a copy of a letter to me that he claimed to have emailed to our office. It was the first time that I had sight of this letter, and I verily state that the letter is a forgery and was never received by the Applicant or any of its employees."

[31] In the Court's view, it was a grave error for the Applicant to choose to ignore the explanation given by the Respondents on the issue of the alleged sale of the goods. The Applicant was required to apply for an

appropriate relief to quash the Respondent's legal standing regarding the alleged sale. The Applicant has properly addressed the issue of the alleged sale in its affidavit but elected not to apply for any particular relief addressing this issue.

[32] Given that the Respondents are alleging a sale of the goods in question to them, it was incumbent upon the Applicant to seek a declaratory order that the alleged sale of the goods did not take place as alleged and that the lease or credit agreement is still in force. In this regard, it is stated by **Herbstein & Van Winsen, The Civil Practice of the High Court of South Africa (5th Ed) Vol.2 at page 1428** that;

"A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. The right or obligation can be existing, prospective or contingent and no specific consequential relief need be claimed.

Roman-Dutch law sanctioned the issue of declaratory orders but only when there has been an interference with the right sought to be declared...

It has been consistently held that there is a two-stage approach to the question whether a declaratory order should be made in terms

of this section. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exist, If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

[33] In the absence of a declaratory order that the alleged sale did not take place or is invalid, the Court is faced with two conflicting positions by the parties. The one position is that the lease agreement was overtaken by a sale agreement and the other position is that there was in fact no such sale and that the credit or lease agreement remains in place. This is obviously a material dispute that cannot be resolved on the papers. This is so because of several reasons. First, the application form and the terms of trade agreed to between the parties anticipated that there could be a sale of the goods in question to an approved customer.

[34] Secondly, Mr. Maake himself concedes that there were discussions regarding the sale of the goods and, in that regard, quotations and communications were exchanged between the parties. There were offers and counter-offers regarding the issue of sale of the goods. The position taken by the Respondents is not a far-fetched position even if it may ultimately be found not to be truthful.

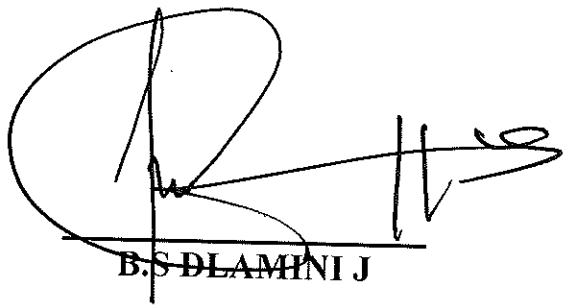
[35] During argument, the Applicant's representative sought to submit in Court that the relief sought by the Applicant is in fact a preservation order, that is, an order authorizing the Deputy Sheriff to attach and keep in his possession the leased equipment pending an action to be instituted by the Applicant in due course against the Respondents. The flaw in this argument was that the relief sought in the notice of motion did not support such a case. The Application is therefore bound to fail on this ground. This is not a case where an Applicant ought to have reasonably known or anticipated that a material dispute of fact would arise, but a case where the Applicant in fact knew about the existing material dispute of fact but chose to ignore it and to approach the Court in motion proceedings.

[36] In the final result, the Court grants the following orders;

(a) The *rule nisi* granted by this Court on the 12th May 2022 is hereby discharged.

(b) The application by the Applicant dated 11th May 2022 is hereby dismissed.

(c) Costs are granted in favour of the Respondents in the ordinary scale.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Applicant: *Ms Marisa Boxshall Smith (Boxshall-Smith Attorneys)*

For Respondent: *Mr. Azi Hlatshwako (Sibusiso B. Shongwe & Associates)*